

Reserved on :31.07.2019

Pronounced on :06.08.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Original Petition No.694 of 2010

M/s.P.N.Writer & Co. Ltd.,
a Company incorporated under the
Companies Act, 1956 and having their
Officer at 105, Dr.B.Ambedkar Road,
Lalbaug, Mumbai – 400 023.

... Petitioner

Vs

1. M/s.Nagarjuna Construction Co. Ltd.,
a Company incorporated under the
Companies Act, 1956 and having their
Corporate Office at Nagarjuna Hills,
Hyderabad – 500 082 and their Branch
Office at 7th & 8th Floor,
Pettukola Towers, No.190 A,
Poonamallee High Road, Kilpauk,
Chennai – 600 010.

2. Mr.V.Krishnamurthy,
Presiding Arbitrator,
No.483/36, 34th Cross, 19th Main,
4th T Block, Jainagar,
Bangalore – 41.

3. Mr.Navin Bhagwati,
Arbitrator,
Bhagwathi Associates Pvt. Ltd.,
Haroon House,
294 Perin Nariman Street,
Mumbai – 01.

4. Mr.K.D.Arcot,
Arbitrator,
U – 46, Plot No.4185,
Anna Nagar,
Chennai – 04.

... Respondents

Prayer :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the impugned Award passed by the respondents 2 to 4 dated 29.01.2010.

For Petitioner : Mr.R.Shankaranarayanan(Sr. Counsel)
for Mr.K.P.Pramoth Kumar

For Respondents : Mr.Thriyambak J.Kannan – R1

ORDER

Aggrieved over the Arbitral Award awarding for amount due under R.A. Bills Rs.1,64,57,251/-, compensation for over head expenses due to extension of work Rs.26,57,200/-, losses suffered on account of extension of bank guarantee Rs.1,58,305/- and claim towards other losses Rs.2,14,604/-, totalling to Rs.1,90,43,482/-, the present Original Petition has been filed.

2. Besides challenging the entire award and dismissal of the counter claim, the learned Senior Counsel for the petitioner mainly focused his contention only with regard to certain heads. The learned Senior Counsel has not made any emphasis with regard to the dismissal of the counter claim. From the submissions of the learned Senior Counsel, the main attack is only towards the Award passed under various heads. In fact, the counter claim is given up. Now, through this petition, from the submission of the learned Senior Counsel for the petitioner confined only to the Award passed by the Arbitral Tribunal.

3. Brief facts leading to filing of this petition is as follows :

The petitioner had invited tenders for the work of construction of Civil, Structural and Infrastructural works of proposed warehouse building at Kilambakkam Village, Kancheepuram Dist. Tamilnadu through their Consultants M/s.B.Mehtalia Consultants Pvt. Ltd., Mumbai. The respondents had submitted their tender for the said work, which was accepted on behalf of the petitioners and Letter of Intent dated 05.07.2001 was issued by the petitioner to the respondents. Thereafter, a Work Order dated 29.11.2001 was issued by the petitioners to the respondents. The formal Contract between the parties include the tender submitted by the respondents read with acceptance thereof by the petitioners as contained in their Letter of Intent dated 05.07.2001 read with the Work Order dated 29.11.2001. As per the said contract between the parties, the date of commencement of the work was 01.08.2001 and the stipulated date of

completion of the work was 15.06.2002. The petitioners submit that the respondents failed to complete the work by 15.06.2002 due to the various delays caused to the work by the respondents and various breaches of contract committed by the respondents despite the respondents themselves re-fixing the target date for completion. Ultimately, the petitioners were left with no other alternative but to terminate the contract for civil works by letter dated 15.04.2003. By the said communication dated 15.04.2003, the petitioners also invoked arbitration for settlement of the disputes under the said agreement for civil works.

4. The respondents appointed on Mr.K.D.Arcot as their nominee Arbitrator and the petitioners appointed one Mr.Navin N.Bhagwati as their nominee Arbitrator. The two nominee Arbitrators appointed one Mr.Krishnamurthy as the Presiding Arbitrator in the matter. The learned Arbitral Tribunal as constituted held their preliminary meeting on 26.08.2003 when directions were given to both the parties for submission of their respective pleadings.

5. The respondent filed their Statement of Claims and supporting documents and the petitioner filed their Statement of Defence and supporting documents including Counter Claims of the Petitioners. The Respondents thereafter filed their Rejoinder. After submission of the entire pleadings, the learned Arbitral Tribunal held various hearings in the matter during which oral

evidence was recorded by the learned Arbitral Tribunal of one witness of the respondents and seven witnesses of the petitioners related to the contract for Civil works. After recording evidence of the witnesses, the respondents commenced their arguments and after completion of the same by the respondents, the petitioners commenced their arguments in defence before the learned Arbitral Tribunal. On 19.12.2006, during the course of the petitioner's arguments, the parties attempted to amicably resolve the disputes through a process of conciliation. However, as the parties could not amicably resolve the issue despite several meetings, the arbitral proceedings were resumed from 27.02.2009. Both parties completed their arguments in respect of the contract for civil works by 13.03.2009.

6. Based on the evidence put forth by both sides the Arbitral Tribunal awarded amount due under R.A. Bills Rs.1,64,57,251/-, compensation for over head expenses due to extension of work Rs.26,57,200/-, losses suffered on account of extension of bank guarantee Rs.1,58,305/- and claim towards other losses Rs.2,14,604/-, totalling to Rs.1,90,43,482/-.

7. The learned Senior Counsel appearing for the petitioner mainly contended that documentary evidence has not been considered. With regard to the electrical works and no opportunity has been given to the petitioner to put forth their grievance. It is the contention of the learned Senior Counsel that

though the Arbitral Tribunal framed issues for causes of delay and extension of time, levying of liquidated damages and termination of the contract and consequences thereof and has found that for causes for delay and extension of time, the Arbitral Tribunal went into details with respect to contract conditions correspondences exchanged, evidence on record, oral evidence, etc. The main reasons for delay as brought out by the Claimant and the contentions of the respondent due to non availability of statutory approvals, delay in issue of drawings, delay in the supply of free issue materials viz. steel and cement, holds imposed by respondent's/Consultants, delay in the release of mobilization advance and payment of RA bills, Non release of 12th final and 13th and 14th RA bills leading to cash crunch and additional and extra items introduced.

8. The learned Senior Counsel brought to the notice of this Court that despite the contention of both the parties, one of the reason for the delay is delay in free issue of materials, steel and cement and the delay was not discussed in the entire Award. Similarly reasons 'Holds imposed by respondents/consultants' also not discussed. Similarly, there was no pleading with regard to the delay in releasing mobilisation advance and the payment of RA bills. It is his contention that the contract and LOI specifically stipulate that the entire responsibility is on the contractor to obtain statutory approvals for phase II before completion of phase – I work. Hence, it is his contention that the Arbitrator has given his own opinion and the finding to the effect that the claimant

has to co-ordinate with the respondent to obtain approval for phase – II work only. Such finding is totally against the terms of the contract. The learned Arbitrator also recorded a finding to the effect that whether all the approval for phase -I has been got or not by the respondent at the time of giving Work Order.

9. It is the further contention of the learned Senior Counsel that whether or not approval was obtained, it is the responsibility of the contractor to complete the work within the period agreed between the parties, which has not been done by the contractor. The delay is mainly due to the contractor. Having accepted the contract to complete the work within the stipulated period, the contractor has to complete the work, irrespective of the fact that there is an approval in respect of phase – I. Therefore, the Arbitrators including their own idea to the effect that the claimant has to co-ordinate with the respondent for obtaining approval for phase I and II is against the terms of the contract. It is his further contention that certain documents, namely the letter dated 06.07.2002 referred in the entire Award has not been placed before the Arbitrator.

10. Similarly the finding of the Arbitrator to the effect that ever after LOI was issued on 05.07.2001, the respondent carried on correspondences with the local authorities on 06.07.2002 is without any materials and no such document is filed. The finding of the Arbitrators that the responsibility assigned to the claimant is only to obtain the statutory approvals from various authorities is also

against the terms of the contract and rendering finding to the effect that running around various places taking applications and other particulars and submitting the same to various offices is also without any evidence. Further, the finding of the Arbitrators to the effect that the claimant co-ordinating the work and only delay arise due to proceeding in the different office of the various authorities is also against the terms of the contract. Hence, it is the contention of the Senior Counsel that the entire finding of the Arbitrators is without any evidence and materials and on the other hand based on the own knowledge of the Arbitrator. Further there is no opportunity given to the petitioner in respect of the claim regarding the electrical work.

11. Whereas, it is the contention of the learned counsel for the respondent that the minutes of the Arbitrators clearly indicate that the proper opportunity has been given and the respondent has continued the cross examination and asked 505 questions and therefore, question of granting further opportunity does not arise at all and totally there were 73 sittings before the Arbitral Tribunal. Hence, it is his contention that sufficient opportunity has been given by the Arbitral Tribunal and when the Tribunal has considered the entire evidence on record and also taken note of the terms of the contract, the Award cannot be interfered merely on the ground that the Arbitrators view is capable of some other view. Hence, every aspect has been discussed by the Tribunal and the termination of notice is also analysed by the Tribunal. It is his further

contention that the letter dated 15.04.2003 indicate that the petitioner requested the respondent to stop the work due to visit of overseas customers in the second week of April 2003. Therefore, the finding of the Tribunal that the termination is not correct is valid and submitted that the Award cannot be interfered.

12. A perusal of the entire Award, it is seen that the Arbitral Tribunal has allowed the claim of the claimant in respect of R.A. Bills to the tune of Rs.1,64,57,251/-, for compensation for over head expenses due to extension of work Rs.26,57,200/-, for losses suffered on account of extension of bank guarantee Rs.1,58,305/- and for claim towards other losses Rs.2,14,604/- totalling Rs.1,90,43,482/-. The claim Nos.2, 3, 5 and 6 were rejected by the Tribunal. As against the rejection of the above claims, the respondent has not preferred any appeal and it has reached its finality. Similarly, the counter claim in entirety has been rejected. The counter claim aspect is also not seriously argued. Only challenge is with regard to the Award passed by the Tribunal with regard to allowing of the claim Nos.1, 4, 7 and 8 as stated above.

13. The learned Tribunal has framed the issues for causes of delay and extension of time, levying of liquidated damages and termination of the contract and consequences thereof. For issue No.1, the following points have been framed by the Tribunal :

1. Was there a delay in the execution of work?

2. If the answer to 1 is in the affirmative, then what are the causes for delay and who is responsible for the delays, and consequences of the same.

3. Whether extension of time could be given for execution of work and the reasons for giving extension of time, and consequences of the same.”

14. As rightly contended by the learned Senior Counsel, the delay in supply of free issue materials, steel and cement and the delay was not discussed in the entire Award. In this regard, it is useful to refer to the scope of work which reads as follows :

“The scope of work is as laid down in the tender dated 01.01.2001, inclusive of supply of all materials, labour, plant and machinery, etc. for completion of the entire work, phase one and two. Obtaining all requisite permissions, sanctions, etc. from local bodies, semi government, government, municipal, etc. for the entire work, phase one and two, shall rest with NCCL, entirely, PNW, shall only be liable for payments to be made to the requisite authorities, as and when intimated by NCCL, to PNW, with valid documentation PNW at no time

will be responsible for any co-ordination, follow up, or delay which may occur in processing above said permissions, PNW expeditiously process any requisite information required for the above said permissions as and when intimated by NCCL.”

The above work Order makes it clear that the petitioner at any time is not responsible for coordination, follow up or delay which may occur in processing above said permissions and entire responsibility in obtaining requisite permission lies on the respondent.

15. Further, clause 1 of the agreement dated 29.11.2001 reads as follows :

“Cement, reinforcement steel, i.e., Tor steel (but not mild steel and binding wire) and structural steel, (but not nuts and bolts, welding rods, pipes, steel for doors, windows and rolling shutters) shall be supplied by Owner free of cost within the premises.”

16. Similarly, clause 4.4 reads as following :

It shall be the responsibility of the Contractor to arrange in time all the materials required for works. If, however, in the opinion of the Engineer-in-Charge, the execution of the work is likely to be delayed due to the Contractor's inability to make

arrangements for supply of materials which normally he has to arrange for, the Engineer-in-Charge shall have the right at his own discretion to issue such materials, if available with Owner or procure the materials from the market or elsewhere and the Contractor will be bound to take such materials at the rates decided by the Engineer-in-Charge. This, however, does not in any way absolve the Contractor from responsibility of making arrangements for the supply of such materials in part or in full, should such a situation occur, nor shall this constitute a reason for the delay in the execution of the work.”

17. On a perusal of the Award, it is seen that the Tribunal has imposed its own idea as to how phase I construction have been completed even before required sanction from various statutory authorities. Similarly, the Tribunal has held that the Claimant is not responsible for the bureaucratic delays due to various procedures to be following in different offices of the various authorities. These findings are infact against the terms of the contract. Similarly, when the contract itself stipulate work has to be completed within a specified time, the Tribunal own idea that how the construction can be started without getting sanction of the work is also against any evidence. The Tribunal also recorded that the respondent is required to register as principle employer in respect of this

work with the Labour Department of Government and only thereafter, the claimant can apply and get labour license. This is also without any evidence.

18. Now the law is well settled that going beyond the terms of the contract and imposing their own idea and arriving at a conclusion without any materials, such Award is certainly liable to be set aside. Considering the settled position of law and the fact that the Arbitrators failed to discuss certain points framed by them and imposing their own idea and also going beyond the terms of the contract, the Award passed by the Arbitral Tribunal is liable to be set aside and the matter is required to be considered afresh by an independent Arbitrator.

19. Accordingly, the Award in respect of Claim Nos.1, 4, 7 and 8 alone is set aside and in respect of other claims, as no challenge has been made by the Claimant and also as no counter claim aspect also not canvassed before this Court, the finding in respect of the same is sustained. No cost.

20. The Honourable Mrs. Justice Chitra Venkatraman, Judge (Retd), High Court, Madras residing at Old No.17-B, New No.31, IV Main Road, Raja Annamalai Puram, Chennai – 600 028 is hereby appointed as the sole Arbitrator to decide the specific issue particularly with regard to the Claim Nos.1, 4, 7 and 8, which is the subject matter of the dispute, afresh as per law. The Arbitration proceedings shall be conducted as per the Madras High Court Arbitration Centre

and the parties shall be governed by the rules of the Madras High Court Arbitration Centre (MHCAC) (Arbitration Proceedings) & (Administrative Cost and Arbitrators Fees) Rules 2014. The learned Arbitrator shall endeavour to conclude the proceedings within 6 months.

06.08.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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To

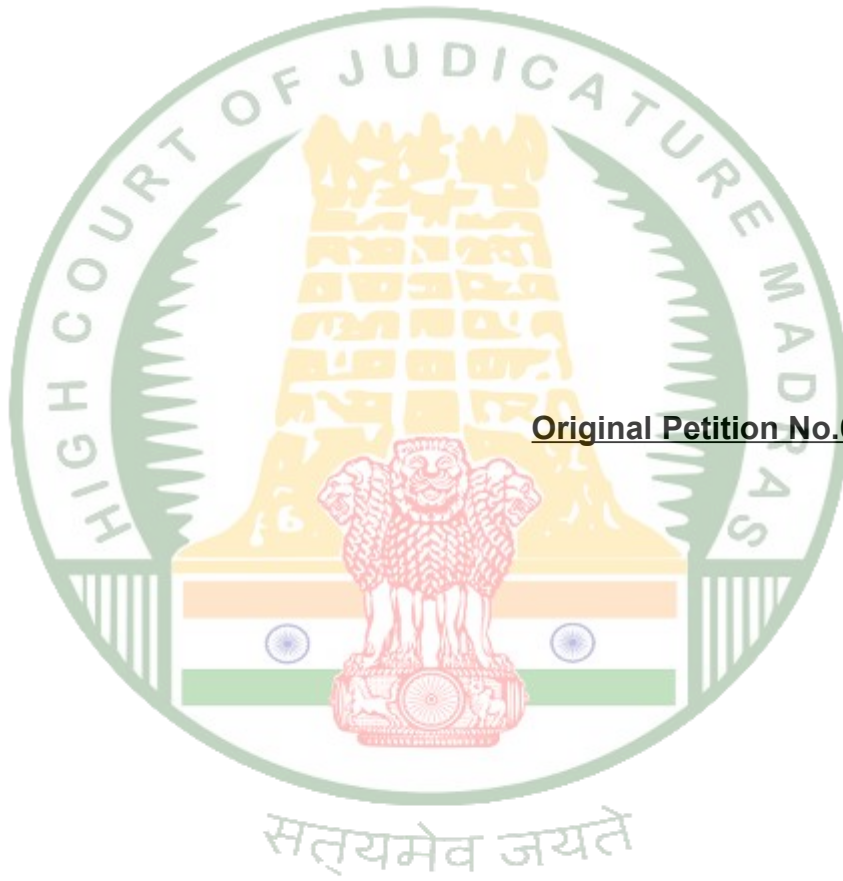
1. The Honourable Mrs. Justice Chitra Venkatraman,
Judge (Retd), High Court, Madras
residing at Old No.17-B, New No.31,
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N.SATHISH KUMAR, J.

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